



## Compliance Recap | September 2023

In September, plan sponsors began sending out Medicare Part D Creditable Coverage notices, and both Oregon and Maine announced Paid Family and Medical Leave laws. Sponsors of group health plans began completing the required Gag Clause Attestation due by the end of 2023. The Departments of Labor, Health and Human Services, and Treasury released guidance on complying with the MHPAEA, and are soliciting comments on ways to motivate participation by TPAs. The government once again offers free COVID-19 tests with home delivery.

### Medicare Part D Creditable Coverage Letters

Every year, the Centers for Medicare and Medicaid Services (CMS) mandates that group health plan sponsors inform Medicare-eligible employees, spouses, and dependents about the status of their health plan's prescription drug coverage, specifically, whether it is creditable or not. Plan sponsors are required to deliver this annual disclosure notice to individuals eligible for Medicare before October 15, 2023, which marks the beginning of the annual enrollment period for Medicare Part D. CMS has supplied [model disclosure notices](#) that employers can utilize. The notice is especially important because Medicare beneficiaries who lack creditable prescription drug coverage and fail to enroll in Medicare Part D when initially eligible may encounter higher premiums if they decide to enroll at a later date.

#### Employer Considerations:

While there are no specific penalties associated with this notice requirement, neglecting to provide the notice could be detrimental to employees. Employers should verify whether their health plans' prescription drug coverage falls into the creditable or non-creditable category and prepare to provide Medicare Part D disclosure notices before October 15, 2023. To streamline the process, employers frequently include Medicare Part D notices within the open enrollment packets. Best practices recommend furnishing the notices to Medicare-eligible individuals ahead of this deadline even if it was included in the open enrollment packet.

### Maine Announces Paid Family and Medical Leave Program

Maine has become the second state in 2023 to implement a [paid family and medical leave](#) (PFML) program. The law applies to all employers in Maine, including state and local governmental employers, with at least one employee in the state. Self-employed individuals have the option to participate. Contributions are divided

evenly between employers and employees, except for certain small employers. Employer size is determined based on the number of employees within the state.

This program requires contributions from both employers and employees, set initially at 1% of wages up to the Social Security taxable wage base. Contributions will begin in 2025, with benefits becoming available in 2026. Individuals covered by the program can take up to 12 weeks of combined leave for medical and family reasons in a benefit year. Employers can choose to participate in the state program or maintain an approved private plan with approval from the Maine Department of Labor (MDOL). Private plan approval is subject to compliance with the law and related rules.

Covered reasons for leave include medical leave for serious health conditions, family leave for bonding, family care, qualifying exigency, care for a covered service member, safety, organ donation, military bereavement, and other circumstances as defined in federal Family and Medical Leave Act (FMLA) regulations. Family members include a wide range of relatives and individuals with significant personal bonds to the employee.

Benefit amounts depend on the employee's average weekly wage relative to the state average weekly wage (SAWW) and may be prorated for intermittent or reduced-schedule leave. PFML benefits are not paid during the first seven days of medical leave. Benefit payments are made weekly and can be reduced by benefits received under other government programs or employer-sponsored policies.

Employers are required to maintain employment-related health insurance benefits during an employee's leave and must protect the employee's right to other employment benefits and plans. Employees with at least 120 days of service have job protection upon return from leave. Employers cannot condition PFML benefits on the use of accrued vacation, sick pay, or other paid time off (PTO).

MDOL will administer the program, which includes employer notice requirements and employee notice of the need for leave. Enforcement measures include penalties for employer notice failures and contribution failures, with penalties transferred to the state PFML Insurance Fund.

#### Employer Considerations:

Maine's PFML program joins those of other states in providing paid leave for various reasons, and employers are advised to prepare for its implementation by considering workforce planning, reviewing existing leave programs, and assessing the feasibility of private plans. Employers should also ensure compliance with payroll systems and educate staff about the program's requirements. Additional guidance and information from MDOL are expected in the future.

## Paid Leave Oregon Begins

Paid Family and Medical Leave benefits have become available to Oregon employees as of September 3, following the passage of [Oregon's Paid Family and Medical Leave Act](#) more than four years ago. Employees will receive a percentage of their wages, depending on how much they earned in the prior year. Employees who earned at least \$1,000 in the prior year can qualify for up to 12 weeks of paid leave per year, with additional weeks for pregnancy-related conditions. The benefits are administered through the Paid Leave Oregon (PLO) program.

Employers and employees share the cost of Paid Leave Oregon through a 1% after-tax contribution rate, with employers responsible for 40% and employees for 60%. Employers can choose to cover the entire contribution as an additional benefit.

Paid Leave Oregon does not replace other leave entitlements under state and federal laws, and benefits may run concurrently or be stacked in certain cases. The eligibility requirements and types of leave also vary among different leave laws.

#### Employer Considerations:

Oregon employers must develop systems to track employee use of different leave types and coordinate with PLO for paid leave benefits. Out-of-state workers' coverage is determined based on where the work is performed, the base of operations, and employee residence.

Employers must provide written notice to employees as well as display a model notice [poster](#) about their rights under the law. Employees must give notice of their paid leave, with different requirements for foreseeable and unforeseeable leave.

## Gag Clause Attestation Requirement

By December 31, 2023, certain group health plans and carriers must submit an attestation to the U.S. Department of Health and Human Services (HHS) confirming their compliance with the "gag clause prohibition" established by the "No Surprises Act" in the Consolidated Appropriations Act of 2021 (CAA). This law prevents plans and issuers from restricting access to specific healthcare information about provider-specific prices, quality of care, and de-identified claims data.

The law mandates plans and insurers to annually submit an [attestation](#) to HHS confirming their compliance, known as the gag clause prohibition compliance attestation requirement. This applies to both fully insured and self-funded group health plans, excluding "excepted benefits." It does not apply to plans consisting solely of health reimbursement arrangements and other account-based group health plans.

#### Employer Considerations:

Failure to comply may result in civil penalties of \$100 per day for each individual affected by the violation. To avoid penalties, group health plan sponsors should communicate with their insurance carriers (for insured plans) or third-party administrators (for self-funded plans) to ensure compliance, especially as the deadline approaches. Plans and insurers can delegate this responsibility to third-party administrators or service providers. However, the plan or insurer remains legally liable for noncompliance.

## Complying with the Mental Health Parity and Addiction Equity Act

Health plans continue to struggle to comply with the Mental Health Parity and Addiction Equity Act (MHPAEA), especially when it comes to assessing nonquantitative treatment limitations (NQTLs). The MHPAEA requires health plans to treat mental health and substance use disorder benefits similarly to medical and surgical benefits.

To help plans comply with this law, the Departments of Labor, Health and Human Services, and Treasury released guidance including [proposed rules for NQTL assessments](#), a [technical release on data submissions](#), and an [enforcement report](#).

The Department of Labor (DOL) asked for comments on these proposals by October 2, 2023, now extended 15 days to October 17, to gather feedback from parties such as insurance companies, plan sponsors, and advocates, to improve the rules and ensure they work effectively. The government is exploring ways to motivate TPAs to help self-funded plans follow the law.

### Employer Considerations:

The DOL has made available a guide for employees, “Understanding Your Mental Health and Substance Use Disorder Benefits,” encouraging participants to pursue information about their plan’s coverage, and their rights and benefits safeguarded under the MHPAEA. Additionally, the DOL provides a template for participants to request information from their health plan regarding treatment limitations that may affect access to mental health or substance use disorder benefits. The form can be used to request:

- General information about treatment limitations, like preauthorization policies for both medical/surgical and mental health treatment.
- Specific information about why benefits were denied. For example, you can ask about the criteria for “failure to show medical necessity” that your health insurance company may have used to deny your claim.

Employers should consider reviewing both documents to understand the requirements of the plan as well as the rights of employees.

### Government Offers Free COVID Tests with Home Delivery

Effective September 25, every U.S. household can again place an [order](#) to receive four more free COVID-19 rapid tests delivered directly to their home. [FAQs](#), including an explanation of handling expired COVID tests, is available.

The available tests available:

- Are rapid antigen at-home tests, not PCR
- Can be taken at home or other locations and give results within 30 minutes (no lab drop-off required)
- Can be used for testing whether you have COVID-19 symptoms or not
- Can be used for testing whether you are up-to-date on your COVID-19 vaccines or not
- Are also referred to as self-tests or over-the-counter (OTC) tests

### Employer Considerations:

Employers should familiarize themselves with the Centers for Disease Control and Prevention recommendations for [isolation and precautions for people with COVID-19](#).

## Question of the Month

Q. I was asked about the NQTL Audit and am not familiar with it. Can you provide information I can share?

A. NQTL audits focus on the nonquantitative limitation requirements from the Mental Health Parity and Addiction Equity Act. Essentially, the Mental Health Parity Act prevents health plans from setting different limitations for mental health benefits than for physical benefits. The easy limits to test are quantitative, like copays for a mental health visit vs. a physical visit.

The harder limits are the nonquantitative limits. For example, whether there are 100 general physicians in an area but only 1 mental health provider. The Department of Labor (DOL) has been active in conducting audits on these limitations. Under the Mental Health Parity Act, plans are supposed to do their own analysis of the nonquantitative limitations in their plan, but very few plans or insurers have done this analysis. The DOL's audits are an attempt to force employers and insurers to pick up the pace of the comparative analysis. The DOL's offers a [self-compliance tool](#) to help assess compliance.

*Answers to the Question of the Week are provided by Kutak Rock LLP. Kutak Rock provides general compliance guidance through the UBA Compliance Help Desk, which does not constitute legal advice or create an attorney-client relationship. Please consult your legal advisor for specific legal advice.*

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